91-604

Supreme Court, U.S.
FILED
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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

A. C. O'LEARY. Petitioners

v

CALIFORNIA HIGHWAY PATROL, ET AL

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

A. C. O'Leary
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Inglewood, California
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PETITION FOR CERTIORARI

QUESTIONS PRESENTED

1. Whether an automobile properly parked, offering no incident to traffic and accompanied by its owner who can move it, can be impounded by the state without prior notice and opportunity for hearing.

2. Whether an automobile impounded by the state can have its destination determined without the owner having an opportunity for an impartial hearing.

3. Whether an automobile impounded by the highway patrol, but without citing the owner, can have its destination determined by an unappealable hearing by one of the highway patrol's own officers.

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PARTIES

The parties, beyond California Highway Patrol, are James E. Smith, its Commissioner, Capt. Bill Brown, Lt. Larry Veale, Sgt. J. McLenson, Officer S. Debolt, all officers of the CHP, and Paul Nissley, dba Kelmark Towing.

There is no other company, parent or subsidiary.

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OFFICIAL AND UNOFFICIAL REPORTS

DELIVERED IN THE CASE BY OTHER COURTS

The District Court made the first statement, unpublished, as a minute statement on February 6, 1989:

> "Defendants State of California, erroneously sued as the California Highway Patrol, W. Brown, L. Veale, J. McLenson and S. Debolts motion to dismiss.
>
> "Court and counsel discuss motion. Counsels argue. Motion is granted with prejudice. Defendant to prepare appropriate order."

The District Court made the second statement, also unpublished, on May 2, 1989, entered June 5, 1989:

> "On April 17, 1989 the Motion to Dismiss of defendants California Highway Patrol and J. Smith came on regularly for hearing before the Honorable William P. Gray, Judge of the United States District Court for the Central District of California. Based on all the papers and pleadings in the file herein, good cause appearing therefor, and pursuant to the holding in Scofield v City of Hillsborough.

> "It is hereby ordered that the Motion to Dismiss of defendants California Highway Patrol and J. Smith is granted and the entire action is dismissed with prejudiced."

The Court of Appeals for the Ninth Circuit made their opinion, unheard and unpublished, on January 14, 1991, (See Appendix) On June 17, 1991, the Court of Appeals for the Ninth Circuit refused a rehearing, also unpublished. Simultaneously they also denied a rehearing en banc predicated upon the difference between their decision in Scofield v City of Hillsborough 862 F2d 579 (9th Cir. 1988) and that of the Court of Appeals of the Seventh Circuit in Miller v City of Chicago 774 F2d 188 (7th Cir. 1985). That statement is also in the Appendix.

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JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit (see Appendix) was entered on the 14th of January, 1991, without a hearing and was unpublished. A rehearing and a rehearing en banc were both denied on the 17th of June, 1991 (also see Appendix). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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THE CONSTITUTIONAL PROVISION AND STATUTES

The Fourteenth Amendment to the Constitution of the United States, in its constituent part, says:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;..."

The pertinent codes of the Vehicle Code of the State of California (CVC) are expressed below:

> §4000(a)(1) "No person shall drive, move, or leave standing upon a highway ... any motor vehicle, ... unless it is registered and the appropriate fees have been paid under this code, ..."
>
> §4017 "The provisions of Section 4000 shall not apply to the moving or operating of a vehicle during the period of time in which application may be made for registration of the vehicle without penalty as provided in Section 4152-5."
>
> §4604 "An application for renewal of registration ... shall be submitted to the department with payment of the required fees for the current registration year and with-

out penalty for the delinquent payment of the fees imposed ... if the department receives the application within 20 days after the date the vehicle is first operated, moved, or left standing ..."

§22651 "Any peace officer ... of a city or a county in which a vehicle is located, may remove a vehicle ... under any of the following conditions ... (o)(1) When any vehicle is found upon a highway ... with a registration expiration date in excess of one year before the date it is found on the highway... For purposes of this subdivision, the vehicle shall be released to the owner or person in control of the vehicle only after the owner or person furnishes the storing law enforcement agency with proof of current registration ..."

§22851(a) "Whenever a vehicle has been removed to a garage under this chapter and the keeper of the garage has received the notice or notices as provided herein, the keeper shall have a lien dependent upon possession ..."

§22852(c) "The poststorage hearing shall be conducted within 48 hours of the request, excluding weekends and holidays. The public agency may authorize its own officer or employee to conduct the hearing if the hearing officer is not the same person who directed the storage of the vehicle."

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CONCISE STATEMENTOF THE CASE

This is an action to retain/regain title to a private vehicle, operating legally in August, 1988, and parked legally, with owner in attendance, for a change of tires. The car was impounded by the California Highway Patrol (CHP) under CVC § 22651(o), but I was refused a citation.

At the earliest hearing, scheduled by the CHP for six days later, Lt. Veale, the hearing officer, and myself were the only attendees. My pleas that CVC §§ 4604 and 4017 were in voke, and that current registration fees were paid but registration awaited air zone certification, were ignored. He considered the two and a half year old registration (while it awaited rebuilding in my yard) to be controlling and declared the hearing over. He also refused me a citation. The hearing is not

appealable. (See CVC 22852(c)).

When the tower/lien holder tried to settle the lien, I refused feeling that I would then face a judge, but the tower went no further. He merely kept the car, although lately he has said that he will release it on some conditions.

With no citation, charge, or other way to get an impartial arbiter, I started this suit in October, 1988, to constitutionally invalidate that statute, on Fourteenth Amendment grounds, and the CHP options of it. Pursuant to two defendant motions to dismiss for immunities, the District Court dismissed under the December, 1988, ruling of the Court of Appeals for the Ninth Circuit in Scofield v City of Hillsborough 862 F.2d 759.

Without hearing on appeal, the Court of Appeals decided, investigating de novo in January ,1991, that all allegations of

unconstitutionality against the statute to be unacceptable for failure to state a claim, and they refused a rehearing in June, 1991. A rehearing en banc because of the great variance between Scofield and the Seventh Circuit in Miller v City of Chicago 774 F.2d 188 (7th Cir. 1985) was also rejected.

In effect we have the CHP impounding but giving no citation to allow encore to a judge, and then furnishing a very partial arbiter to provide a non-appealable decision which the District Court and the Court of Appeals say cannot be heard.

The jurisdiction of the District Court was 42 U.S.C. 1983.

PETITION FOR CERTIORARI

REASONS FOR GRANTING THE PETITION

The basic reason is the one advanced by the Court of Appeals in their opinion, Gobel v Maricopa County 867 F.2d 1201, 1203 (9th Cir. 1989) where they said:

> "A Rule 12(b)(6) dismissal motion can be granted only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim."

and

> "We liberally construe civil rights complaints."

as well as their opinion in Usher v Los Angeles 828 F.2d 556, 561 (9th Cir. 1987) where they said:

> "On motion to dismiss, the issue is not whether plaintiff will ultimately prevail, but whether he is entitled to offer evidence to support his claim."

and

> "On appeal, court reviewing grant of motion to dimiss must also presume truth of allegations of complaint."

Individual reasons follow for each of the four applications given by the

Court of Appeal.

a. Pre-tow notice and opportunity for hearing (complaint ¶ 17).

b. Impartial hearing by an institutionally biased fellow officer (complaint ¶¶ 17 and 38).

c. Probable cause (complaint ¶¶ 11, 12, and 17).

d. CVA §22651(o) substantial violations (complaint ¶¶ 22 thru 26) and, for CHP work, (complaint ¶¶ 31 and 33).

1. With the emphasis in the 70's on due process in governmental procedures with the private property of its citizens, and the issuance of cases like Fuentes v Shevin 407 U.S. 67 (1972) with its holding that state seizure of private property before notice to the owner and opportunity to oppose such action could only be justified in "extraordinary situations". the courts required something

more than a casual nod from a policeman or a court clerk to attach or impound someone's property.

Later, in a case in which seizure was not involved, Mathews v Eldridge 424 U.S. 319 (1976), closing a property right was not valid until after an impartial adversarial hearing. The resolution of liens against personal property was held in abeyance until that impartial hearing ruled.

However, in 1982, a Court of Appeals for the Seventh Circuit in Sutton v City of Milwaukee 672 F.2d 644 said, "..there is no issue before us regarding the towing of illegally parked cars in emergences..", and classifying Mathews at 645:

> "...where the Supreme Court annouced a simple cost-benefit test of general applicability for deciding whether due process requires notice and hearing before government may deprive a person of property."

The Court then considered Fuentes out of date and rendered an opinion that it was

correct to impound illegally parked cars in non-emergency situations, with no pre-tow notice, if:

> " ..(1) it notified owners by mail within 24 hours, (2) it provided hearing by the city attorney within one business day of a request, (3) de novo review was available at the next session of the municipal court, and (4) prior payment of other parking citations was not a pre-condition for release."

This decision was not given great weight in the Seventh Circuit, Valdez v Ottawa 185 Ill App 3d 972, 434 NE 2d 1192 (cars towed only when "..jeopardizes public safety by either creating an unsafe condition or significantly hindering the efficient movement of traffic.") or Miller v Chicago No. 82 C 1607 (ND Ill. Nov. 18, 1983)(R.Item 29)("..abandoned or illegally parked vehicles where prior notice and hearing requirements may be dispensed with only if the particular vehicle poses an actual danger to traffic or other menace."). Finally, in 1985,

the Seventh Circuit stepped in. In Miller v City of Chicago 774 F.2d 188, 191:

> "... the general rule, recently reiterated by the Supreme Court that "absent an 'extraordinary situation' the power of the state to seize a person's property may not be invoked without prior notice and an opportunity to be heard" (citations omitted); but cf Sutton 672 F.2d at 647 (questioning the continued validity of the "extraordinary situation" rule stated in Fuentes, supra). Thus predeprivation notice and hearing represent the norm and the state must forward important reasons to justify a departure therefrom"

With this 1985 repudiation of Sutton in view in 1988, the Ninth Circuit uses Sutton and Soffer v City of Costa Mesa 798 F.2d 361 for their opinion in Scofield v City of Hillsborough 862 F.2d 759 (9th Cir. 1988). Of course, Soffer had 9 days notice and didn't request a hearing. Therefore the refusal of notice and hearing are direct variation of the Seventh Circuit which guarantees it.

2. The Jordan v City of Lake Oswego 734 F.2d 1374, 1376 n.1 (9th Cir. 1984) in a footnote (quoting a similar footnote in Stetten v Wadsworth Veterans Hospital 537 F.2d 361, 369 n.18 (9th Cir. 1976)) states that:

> "There is no constitutional requirement that the decision maker be an uninvolved person when a property interest protected by due process is at stake."

Both Jordan and Stetten cite Arnett v Kennedy 416 U.S. 134 as authority but I can find no such opinions there. Mr. Justice Rehnquist, with whom the Chief Justice and Mr. Justice Stewart joined, in their note 21:

> "Because of our holding with respect to appellee's property-type expectations under Roth and Sindermann, we do not reach this question in its constitutional dimension. But since our Brother White suggests that he reaches that conclusion as a matter of statutory construction, albeit because of constitutional emanations, we state our reasons for disagreeing with his conclusion. We, of course, find no constitutional overtones lurking in

> the statutory issue, because of our holding as to the nature of appellee's property interest in his employment...."

In addition to Mr. Justice White, there was Mr. Justice Powell, with whom Mr. Justice Blackmun joins, agreeing that Fifth Amendment concerns were met by the full evidentiary hearing for OEO and the Civil Service Commission, after the fact. Mr. Justice Marshall, with whom Mr. Justice Douglas and Mr. Justice Brennan concur, dissenting, holding that Fifth Amendment requires a beforehand evidentiary clearing. I find the score 6-0 for a constitutional employment of an impartial hearing, with three abstentions for the statutory process to operate.

On the other hand, Gray v City of Chicago 594 F Supp 1441 (ND Ill. 1984) cites Arnett as authority for holding that the Assistant Corporation Counsel cannot hear because he is not impartial.

Hale v Tyree 491 F.Supp. 622 (ED Tenn. 1979) had ruled a Chief of Police to be unqualified to be a hearing officer.

3. No probable cause was indicated in the hearing at all. My claims that my operation in accord with CVC §§ 4604 and 4017 were ignored by quoting the claims of CVC § 22651(o) which was the subject of the claim to begin with.

4. I suppose the state expected the impound to be accompanied by a ticket so that the owner would have an impartial hearing if the owner wanted it. The CHP does it without a citation, which keeps the owner out of the courts. Again, a citation of CVC § 22651(o) as the authority has little credence.

Dated: 2 September 1991

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90303-1918

APPENDIX

The Court of Appeals for the Ninth Circuit opinion, unheard and unpublished, on January 14, 1991, and is published in its entirety below. (The footnotes are at the end.)

A, C, O'LEARY,	)	No.89-55747
	)	
Plaintiff-Appellant	)	D. C. No.
	)	CV-88-6065-WPG
vs	)	
	)	
CALIFORNIA HIGHWAY PATROL, et al.,	)	MEMORANDUM*
	)	
Defendants-Appellees	)	
	)	

Appeal from the United States District Court for the Central District of California
William P.Gray, District Judge, Presiding

Submitted: October 15, 1900**

Before: Wallace, Skopil, and Pregerson, Circuit Judges.

A. C. O'Leary appeals pro se the district court's dismissal of his 42 U.S.C. § 1983 action for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). We have jurisdiction pursuant to 28 U.S.C. § 1291 and review de novo. Gobel v Maricopa County, 867 F.2d 1201, 1203 (9th Cir. 1989). We affirm in part and reverse and remand in part.

A. Eleventh Amendment

O'Leary contends that the district court erred in determining that the California Highway Patrol (CHP) and the individual CHP officers are immune from suit under the eleventh amendment. Because the CHP is a state agency, see Cal. Gov't Code § 11000 (West 1985 & Supp. 1990), and the State of California has not consented to suit, see Atascadero State Hosp. v Scanlon, 473 U.S.234, 241 (1985), both the State and the CHP enjoy sovereign immunity and cannot be sued under section 1983, regardless of the nature of the relief sought, see Welch v Texas Dept. of Highways and Pub. Transp., 483 U.S. 468, 472 (1987) Pennhurst State School & Hosp. v Halderman, 465 U.S. 89, 100-01 (1984); Shaw v California Dept. of Alcoholic Beverage Control, 788 F.2d 600, 603 (9th Cir.1986). Moreover, the eleventh amendment bars O'Leary's claims against the CHP officers sued in their official capacities for monetary damages. Pennhurst State School, 465 U.S.at 101.

Construing O'Leary's pro se complaint liberally, however, we conclude that he sued the individual CHP officers in their personal capacities. See Estelle v Gamble, 429 U.S. 97, 106 (1976); Soffer v City of Costa Mesa, 798 F.2d 361, 363 (9th Cir. 1986); see also Noll v Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987). O'Leary might possibly maintain an action against these officers in their personal capacities. See Scheuer v Rhodes, 416 U.S. 232, 238 (1974); Draper v Coombs, 792 F.2d 915, 919 (9th Cir. 1986). Therefore, we now turn to the merits of O'Leary's contentions to determine whether he has stated a claim for violation of his due process rights.

B. Due Process

1. Pre-Towing Hearing

O'Leary contends that he was deprived of due process because he did not receive a hearing before his car was towed. It is settled law in this circuit, however, that due process does not require a pre-towing hearing. See Scofield v City of Hillsborough, 862 F.2d 759, 762 (9th Cir. 1988); Soffer v City of Costa Mesa, 798 F.2d 361, 362-63 (9th Cir. 1986).

2. Bias and Probable Cause

O'Leary contends that his post-towing hearing violated due process because the nearing officer, a lieutenant with the CHP, was institutionally biased. There is, however, no constitutional requirement that the decisionmaker be an uninvolved person when a property interest protected by due process is at stake. Jordan v City of Lake Oswego, 734 F.2d 1374, 1376 n.1 (9th Cir. 1984)(citing Arnett v Kennedy, 416 U.S. 134, 155-56 & n.21 (1974)). O'Leary fails to allege any personal bias by Lt. Veale and thus, does not state a due process claim. See Jordan, 734 F.2d at 1376 n.1.

3. Probable Cause

O'Leary contends that the CHP failed to show probable cause at his post-towing hearing to justify the towing of his car. Section 22651(o) of the California Vehicle Code (West 1985 & Supp. 1990) authorizes CHP officers to tow and impound vehicles found on the highway with a registration expiration date in excess of one year before the date the vehicle is found. Section 22852, as amended in 1986, only requires that "reasonable grounds for the storage" be established. See California Vehicle Code § 22852(e)(West Supp. 1990). Because Lt. Veale found that O'Leary's car registration had expired on January 20, 1986, more than one year before the

car was found on the highway on August 20, 1988, reasonable grounds were established to justify the towing and storage of the car. Therefore the district court did not err in dismissing this claim.

4. Section 22651(o)

O'Leary next contends that California Vehicle Code § 22651(o) is unconstitutional as a violation of his substantive due process rights. To establish a claim of denial of substantive due process, O'Leary must prove that the state official's action was clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, or general welfare. See Village of Euclid v Ambler Realty Co., 272 U.S.365, 395 (1926); Sinaloa Lake Owners Ass'n v City of Simi Valley, 882 F.2d 1398, 1407 (9th Cir. 1985), cert denied 110 S.Ct. 1317 (1990). O'Leary made only a conclusory allegation that section 22651(o) violates his due process rights. Moreover, the officials action in this case was clearly warranted pursuant to the vehicle code and thus, O'Leary has failed to show any irrational or arbitrary interference with property rights. Therefore, the district court did not err in dismissing this claim.

5. Post-Towing Hearing

O'Leary contends that he was deprived of due process because his post-towing hearing was not conducted within 48 hours of his request as required by California Vehicle Code § 22852 (West 1985 & Supp. 1990).

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Stypmann v City and County of San Francisco, 557 F.2d 1338, 1343-44 (9th Cir. 1977)(quoting Mathews v Eldridge, 424 U.S.

319, 333 (1976)). Seizure of property without prior hearing has been sustained only where the owner is afforded a prompt post-towing hearing. See Scofield v City of Hillsborough, 862 F.2d 759, 764 (9th Cir. 1988)(citing Goichman v Rheuban Motors, Inc., 682 F.2d 1320, 1324 (9th Cir. 1982).

In Stypmann, this court held that the California Vehicle Code, which at the time did not provide for any post-towing hearing, was not constitutionally sufficient. 557 F.2d at 1342. There was a San Fran- ordinance in existence at that time, however, that provided for a post-towing hearing within five days of a request. See id, at 1340-41. This court stated that "[a] five-day delay in justifying detention of a private vehicle is too long" and that "a five-day delay is clearly excessive." Id, at 1344. This court held, therefore, that the procedural protection afforded by the San Francisco ordinance was not constitutionally sufficient and violated the due process clause. See id, at 1342, 1345.

Following the Stypmann decision, section 22852 of the California Vehicle Code was enacted and provided that a hearing must be held within 48 hours of the request, excluding weekends and holidays. Scofield, 862 F.2d at 764 n.3 (citing Goichman, 682 F. 2d at 1323); California Vehicle Code § 22852(c). In Goichman, this court held that the provision for a post-seizure hearing within 48 hours satisfied the requirements of due process. 682 F.2d at 1325.

Here, O'Leary requested his post-towing hearing on August 22, 1988, and the hearing was conducted on August 26, 1988, more than 100 hours after his request. Based on this circuit's ruling in Stypmann

the five-day delay may in fact amount to a violation of O'Leary's procedural due process rights. Therefore, the district court erred in determining that O'Leary failed to state a due process claim for the delay in holding the post-towing hearing.

AFFIRMED in part, REVERSED and REMANDED in part.

Footnotes:

* This deposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Circuit R. 36-3.

** The panel unanimously finds this case suitable for disposition without oral argument. Fed.R.App.P.34(a); 9th Cir.R. 34-4.

1. In his opening brief, O'Leary claims that he also is challenging the constitutionality of California Vehicle Code §§ 22851 and 22852. The appellees assert that O'Leary is raising this claim for the first time on appeal. In his reply brief, O'Leary admits that he did not challenge the constitutionality of these statutes below and properly abandons his challenge to them on appeal.

After a petition for rehearing and a rehearing en banc for the difference in Scofield v City of Hillsborough, 862 F.2d 759 (9th Cir. 1988) and Miller v City of Chicago, 774 F.2d 188 (7th Cir. 1985), the Court of Appeals for the Ninth Circuit on the 17th of June, 1991 said, on both:

A. C. O'LEARY,	)	No. 89-55747
	)	
Plaintiff-Appellant	)	D.C.No.
	)	CV-88-6065-WPG
vs,	)	
	)	
CALIFORNIA HIGHWAY PATROL, et al.,	)	O R D E R
	)	
	)	
Defendants-Appellees	)	
	)	

Before: Wallace, Skopil, and Pregerson, Circuit Judges

The panel has voted to deny appellants petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

The district court made one minute order, unsigned and made for only part of defendants, as shown on page 1. His final order, upon which this appeal is founded, was entered by the clerk on June 5, 1989, and is entered on the next page:

A. C. O'LEARY, Plaintiff v. CALIFORNIA HIGHWAY PATROL, JAMES P. SMITH, CAPT. BILL BROWN, LT. LARRY VEALE, SGT. McLENSON, OFFICER S. DEBOLT, KELMARK TOWING, DOE 1 aka CHARLEY, and DOES II through XV, and PAUL and LINDA NASSLEY, Defendants	)	No. 88-06065 WPG ORDER

On April 17, 1989 the Motion to Dismiss of defendants California Highway Patrol and J. Smith come on regularly for hearing before the Honorable William P. Gray, Judge of the United States District Court for the Central District of California. Based on all the papers and pleadings in the file herein, good cause appearing therefor, and pursuant to the holding in Scofield v City of Hillsborough.

It is hereby ordered that the Motion to Dismiss of defendants California Patrol and J. Smith is granted and the entire action is dismissed with prejudiced.

Dated: May 2, 1989

HONORABLE WILLIAM P.GRAY
Judge for the United States District Court, Central District of California